

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLIAM B. WESTWOOD,

Plaintiff,

-vs-

**MEN'S MEDICAL NEW YORK, P.C. and
LAWRENCE A. SMILEY,**

Defendants.

**ANSWER AND
AFFIRMATIVE DEFENSES OF
DEFENDANTS MEN'S MEDICAL
NEW YORK, P.C. AND
LAWRENCE A. SMILEY**

Civil Action No. 1:13-cv-06641-KBF

Defendants Men's Medical New York, P.C. and Lawrence A. Smiley ("Answering Defendants"), by their attorneys, Hiscock & Barclay, LLP, hereby responds to Plaintiff's, William B. Westwood's ("Plaintiff" or "Westwood") Complaint, [Dkt. No. 1], ("Complaint") as follows:

Complaint Allegations As To Nature of Action and Parties

1. The allegations contained in Paragraph 1 of the Complaint contain legal conclusions to which no response is required. To the extent that any further response is required, Answering Defendants deny knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 1 of the Complaint.

2. The allegations contained in Paragraph 2 of the Complaint refer to documents or records, which, if they exist, speak for themselves, and any inconsistent characterization thereof is denied. To the extent that any further response is required, Answering Defendants deny knowledge or information sufficient to form a belief as to the truth of the factual allegations contained in Paragraph 2 of the Complaint.

3. Answering Defendants deny knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 3 of the Complaint.

4. Answering Defendants admit the allegations contained in Paragraph 4 of the Complaint.

5. Answering Defendants admit that Lawrence A. Smiley is a physician specializing in the treatment of male sexual dysfunction, but deny the remaining allegations contained in Paragraph 5.

6. Answering Defendants deny the allegations contained in Paragraph 6 of the Complaint.

7. Answering Defendants deny knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 7 of the Complaint.

8. Answering Defendants deny the allegations contained in Paragraph 8 of the Complaint.

9. The allegations contained in Paragraph 9 of the Complaint contain legal conclusions to which no response is required. To the extent that any further response is required, Answering Defendants deny knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 9 of the Complaint.

Complaint Allegations As To Jurisdiction And Venue

10. Answering Defendants deny knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 10 of the Complaint.

11. Answering Defendants admit the allegations contained in Paragraph 11 of the Complaint.

12. Answering Defendants admit that Lawrence A. Smiley is a citizen of the State of New York, but deny the remaining allegations contained in Paragraph 12.

13. The allegations contained in Paragraph 13 of the Complaint contain legal conclusions to which no response is required. To the extent that any further response is required, Answering Defendants deny knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 13 of the Complaint.

14. The allegations contained in Paragraph 14 of the Complaint contain legal conclusions to which no response is required. To the extent that any further response is required, Answering Defendants deny knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 14 of the Complaint.

15. The allegations contained in Paragraph 15 of the Complaint contain legal conclusions to which no response is required. To the extent that any further response is required, Answering Defendants deny knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 15 of the Complaint.

16. The allegations contained in Paragraph 16 of the Complaint contain legal conclusions to which no response is required. To the extent that any further response is required, Answering Defendants deny knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 16 of the Complaint. By way of further response, Answering Defendants deny that the Court has personal jurisdiction over Lawrence A. Smiley.

Complaint Allegations As To Background Facts

17. Answering Defendants deny knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 17 of the Complaint.

18. Answering Defendants deny knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 18 of the Complaint.

19. Answering Defendants deny knowledge or information sufficient to form a belief as to the truth of the factual allegations contained in Paragraph 19 of the Complaint.

20. Answering Defendants deny knowledge or information sufficient to form a belief as to the truth of the factual allegations contained in Paragraph 20 of the Complaint.

21. Answering Defendants deny knowledge or information sufficient to form a belief as to the truth of the factual allegations contained in Paragraph 21 of the Complaint.

22. The allegations contained in Paragraph 22 of the Complaint refer to documents or records which speak for themselves, and any inconsistent characterization thereof is denied.

23. Answering Defendants deny knowledge or information sufficient to form a belief as to the truth of the factual allegations contained in Paragraph 23 of the Complaint.

24. Answering Defendants deny knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 24 of the Complaint.

25. Answering Defendant deny knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 25 of the Complaint

26. The allegations contained in Paragraph 26 of the Complaint contain legal conclusions to which no response is required. By way of further response, the allegations contained in Paragraph 26 of the Complaint refer to documents or records which speak for themselves, and any inconsistent characterization thereof is denied. To the extent that any further response is required, Answering Defendants deny knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 26 of the Complaint.

27. Answering Defendants deny knowledge or information sufficient to form a belief as to the truth of the factual allegations contained in Paragraph 27 of the Complaint.

28. Answering Defendants deny knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 28 of the Complaint.

29. The allegations contained in Paragraph 29 of the Complaint refer to documents or records which speak for themselves, and any inconsistent characterization thereof is denied. To the extent that any further response is required, Answering Defendants deny knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 29 of the Complaint.

30. The allegations contained in Paragraph 30 of the Complaint refer to documents or records which speak for themselves, and any inconsistent characterization thereof is denied. To the extent that any further response is required, Answering Defendants deny knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 30 of the Complaint.

31. Answering Defendants deny knowledge or information sufficient to form a belief as to the truth of the factual allegations contained in Paragraph 31 of the Complaint.

32. Answering Defendants deny knowledge or information sufficient to form a belief as to the truth of the factual allegations contained in Paragraph 32 of the Complaint.

33. Answering Defendants deny knowledge or information sufficient to form a belief as to the truth of the factual allegations contained in Paragraph 33 of the Complaint.

34. The allegations contained in Paragraph 34 of the Complaint refer to documents or records which speak for themselves, and any inconsistent characterization thereof is denied. To the extent that any further response is required, Answering Defendants deny knowledge or

information sufficient to form a belief as to the allegations contained in Paragraph 34 of the Complaint.

35. The allegations contained in Paragraph 35 of the Complaint contain legal conclusions to which no response is required. To the extent that any further response is required, Answering Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 35 of the Complaint.

36. The allegations contained in Paragraph 36 of the Complaint contain legal conclusions to which no response is required. To the extent that any further response is required, Answering Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 36 of the Complaint. By way of further response, Defendants Mens Medical was filed with the Department of State on August 15, 2011 and Lawrence A. Smiley is listed as Chief Executive Officer.

37. Answering Defendants admit that a website was created at mensmedicalnewyork.com, but denies the remaining allegations contained in Paragraph 37 of the Complaint.

38. Answering Defendants deny the allegations contained in Paragraph 38 of the Complaint.

39. Answering Defendants deny the allegations contained in Paragraph 39 of the Complaint.

40. Answering Defendants deny the allegations contained in Paragraph 40 of the Complaint.

41. The allegations contained in Paragraph 41 of the Complaint contain legal conclusions to which no response is required. To the extent that any further response is required, Answering Defendants deny the allegations contained in Paragraph 41 of the Complaint.

42. The allegations contained in Paragraph 42 of the Complaint refer to documents or records, which, if they exist and are authenticated, speak for themselves, and any inconsistent characterization thereof is denied.

43. Answering Defendants deny the allegations contained in Paragraph 43 of the Complaint.

44. The allegations contained in Paragraph 44 of the Complaint refer to documents or records which speak for themselves, and any inconsistent characterization thereof is denied.

45. Answering Defendants deny the allegations contained in Paragraph 45 of the Complaint.

46. Answering Defendants deny the allegations contained in Paragraph 46 of the Complaint.

47. Answering Defendants deny the allegations contained in Paragraph 47 of the Complaint.

48. Answering Defendants deny the allegations contained in Paragraph 48 of the Complaint.

49. Answering Defendants deny knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 49 of the Complaint.

50. Answering Defendants deny knowledge or information sufficient to form a belief as to the truth of the factual allegations contained in Paragraph 50 of the Complaint.

51. Answering Defendants deny the allegations contained in Paragraph 51 of the Complaint.

52. Answering Defendants deny knowledge or information sufficient to form a belief as to the truth of the factual allegations contained in Paragraph 52 of the Complaint.

53. The allegations contained in Paragraph 53 of the Complaint refer to documents or records which speak for themselves, and any inconsistent characterization thereof is denied. To the extent that any further response is required, Answering Defendants deny knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 53 of the Complaint.

54. Answering Defendants deny knowledge or information sufficient to form a belief as to the truth of the factual allegations contained in Paragraph 54 of the Complaint.

55. The allegations contained in Paragraph 55 of the Complaint contain legal conclusions to which no response is required. To the extent that any further response is required, Answering Defendants deny the allegations contained in Paragraph 55 of the Complaint.

56. The allegations contained in Paragraph 56 of the Complaint contain legal conclusions to which no response is required. To the extent that any further response is required, Answering Defendants admit there were preliminary attempts to settle the matter, but deny and/or deny knowledge or information sufficient to form a belief as to the remaining allegations contained in Paragraph 56 of the Complaint.

57. The allegations contained in Paragraph 57 of the Complaint contain legal conclusions to which no response is required. To the extent that any further response is required, Answering Defendants deny the allegations contained in Paragraph 57 of the Complaint.

58. Answering Defendants deny the allegations contained in Paragraph 58 of the Complaint.

59. Answering Defendants deny knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 59 of the Complaint.

60. Answering Defendants deny the allegations contained in Paragraph 60 of the Complaint.

61. Answering Defendants deny the allegations contained in Paragraph 61 of the Complaint.

62. Answering Defendants deny the allegations contained in Paragraph 62 of the Complaint.

63. Answering Defendants deny the allegations contained in Paragraph 63 of the Complaint.

64. Answering Defendants deny knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 64 of the Complaint.

65. Answering Defendants deny knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 65 of the Complaint.

66. Answering Defendants deny knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 66 of the Complaint.

67. The allegations contained in Paragraph 67 of the Complaint contain legal conclusions to which no response is required. To the extent that any further response is required, Answering Defendants deny knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 67 of the Complaint.

**Complaint Allegations As Count I: Against MM For Willful Copyright
Infringement**

68. Answering Defendants repeat and reallege paragraphs 1 through 67 above as if fully set forth herein.

69. Answering Defendants deny the allegations contained in Paragraph 69 of the Complaint.

70. Answering Defendants deny the allegations contained in Paragraph 70 of the Complaint.

71. Answering Defendants deny the allegations contained in Paragraph 71 of the Complaint.

72. Answering Defendants deny the allegations contained in Paragraph 72 of the Complaint.

73. Answering Defendants deny the allegations contained in Paragraph 73 of the Complaint.

74. The allegations contained in Paragraph 74 of the Complaint contain legal conclusions to which no response is required. To the extent that any further response is required, Answering Defendants deny the allegations contained in Paragraph 74 of the Complaint.

75. Answering Defendants deny the allegations contained in Paragraph 74 of the Complaint.

76. Answering Defendants deny the allegations contained in Paragraph 76 of the Complaint.

77. Answering Defendants deny the allegations contained in Paragraph 77 of the Complaint.

Complaint Allegations As To Count II: Against Smiley for Vicarious Liability

78. Answering Defendants repeat and reallege paragraphs 1 through 77 above as if fully set forth herein.

79. Answering Defendants deny the allegations contained in Paragraph 79 of the Complaint.

80. Answering Defendants deny the allegations contained in Paragraph 80 of the Complaint.

81. Answering Defendants deny the allegations contained in Paragraph 81 of the Complaint.

82. Answering Defendants deny the allegations contained in Paragraph 82 of the Complaint.

83. Answering Defendants deny the allegations contained in Paragraph 83 of the Complaint.

Complaint Allegations As To Count III: MM For Violating § 1202(b)(1) Of The DMCA By Removing Mr. Westwood's CMU From Physiology

84. Answering Defendants repeat and reallege paragraphs 1 through 83 above as if fully set forth herein.

85. The allegations contained in Paragraph 85 of the Complaint contain legal conclusions to which no response is required. To the extent that any further response is required, Answering Defendants deny knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 85 of the Complaint.

86. The allegations contained in Paragraph 86 of the Complaint contain legal conclusions to which no response is required. To the extent that any further response is required,

Answering Defendants deny knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 86 of the Complaint.

87. Answering Defendants deny the allegations contained in Paragraph 87 of the Complaint.

88. Answering Defendants deny the allegations contained in Paragraph 88 of the Complaint.

89. Answering Defendants deny the allegations contained in Paragraph 89 of the Complaint.

90. Answering Defendants deny the allegations contained in Paragraph 90 of the Complaint.

91. Answering Defendants deny the allegations contained in Paragraph 91 of the Complaint.

92. Answering Defendants deny the allegations contained in Paragraph 92 of the Complaint.

General Denial

93. Answering Defendants deny any allegations herein not specifically admitted or denied.

Complaint Allegations As To Plaintiff's WHEREFORE Clause

94. Answering Defendants deny that Plaintiff is entitled to relief as against Answering Defendants.

AFFIRMATIVE DEFENSES

FIRST AFFIRMATIVE DEFENSE

95. Plaintiff has failed to state a cause of action upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

96. Upon information and belief, Plaintiff lacks standing to sue.

THIRD AFFIRMATIVE DEFENSE

97. Upon information and belief, Plaintiff's claims are barred by the doctrines of laches, waiver, estoppel, and/or ratification.

FOURTH AFFIRMATIVE DEFENSE

98. Upon information and belief, the Court lacks subject matter jurisdiction over Plaintiff's claims.

FIFTH AFFIRMATIVE DEFENSE

99. Upon information and belief, the Court lacks personal jurisdiction over Plaintiff's claims.

SIXTH AFFIRMATIVE DEFENSE

100. No act or omission by Answering Defendants caused, contributed to, or induced any infringement of any alleged copyright claimed by Plaintiff.

SEVENTH AFFIRMATIVE DEFENSE

101. The copyrights in suit are invalid for failure to comply with one or more provisions of Title 17 of the United States Code related to copyrightability, in that among other things, the Plaintiff's alleged copyrights seek to protect elements that cannot be protected under Title 17, Section 101 et seq. of the United States Code.

EIGHTH AFFIRMATIVE DEFENSE

102. The copyrights in suit are invalid for failure to comply with one or more of the formalities related to notice or registration as required by Title 17 of the United States Code and Title 37 of the Code of Federal Regulations related to copyrightability.

NINTH AFFIRMATIVE DEFENSE

103. Plaintiff's claims are barred by the merger doctrine.

TENTH AFFIRMATIVE DEFENSE

104. Plaintiff's claims are barred by the *scenes a faire* doctrine.

ELEVENTH AFFIRMATIVE DEFENSE

105. The conduct of Answering Defendants was in good faith, engaged in without malice, and/or was privileged and justified, and would constitute innocent infringement if found to be infringement.

TWELFTH AFFIRMATIVE DEFENSE

106. Upon information and belief, some or all of Plaintiff's claims may be barred by the Statute of Limitations.

THIRTEENTH AFFIRMATIVE DEFENSE

107. Upon information and belief, the alleged works of the Plaintiff are in the public domain, and thus are not protected by copyright law.

FOURTEENTH AFFIRMATIVE DEFENSE

108. Upon information and belief, the Plaintiff's attempt to register his alleged works with the Copyright Office and/or asserting copyright infringement for features beyond the scope

of any of Plaintiff's copyright was a misuse of the copyright law, thus rendering them unprotected by law and otherwise invalid.

FIFTEENTH AFFIRMATIVE DEFENSE

109. Upon information and belief, Plaintiff's claims are barred as being expressly or impliedly abandoned by among other things failure to enforce its claims against others.

SIXTEENTH AFFIRMATIVE DEFENSE

110. To the extent that any of the features of the Plaintiff's alleged works were copied or used, those features are not protected by copyright law.

SEVENTEENTH AFFIRMATIVE DEFENSE

111. The doctrine of fair use bars Plaintiff's claims.

EIGHTEENTH AFFIRMATIVE DEFENSE

112. To the extent that any of the features of the Plaintiff's alleged works were copied or used, Plaintiff has failed to mitigate its damages.

NINETEENTH AFFIRMATIVE DEFENSE

113. To the extent that any of the features of the Plaintiff's alleged works were copied or used, any alleged damages were not proximately caused by Answering Defendants.

TWENTIETH AFFIRMATIVE DEFENSE

114. Upon information and belief, Plaintiff's claims are barred by the doctrine of unclean hands.

DEMAND FOR JURY TRIAL

115. Answering Defendants hereby demand a trial by jury of all claims and issues so triable.

REQUESTS FOR RELIEF

WHEREFORE, Answering Defendants respectfully request that:

1. The Complaint be dismissed in its entirety;
2. Answering Defendants be awarded the reasonable costs and disbursements incurred in this action, including costs and attorneys' fees to the extent permitted by law or agreement; and
3. Answering Defendants be awarded such other and further relief as is just and proper.

DATED: October 15, 2013

HISCOCK & BARCLAY, LLP

By: /s/_____

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CERTIFICATE OF SERVICE

I, Michael A. Oropallo, counsel for Defendants, Men's Medical New York, P.C. and Lawrence A. Smiley, hereby certify that on the 15th day of October, 2013, I caused a true and correct copy of the foregoing Answer And Affirmative Defenses Of Defendants Men's Medical New York, P.C. and Lawrence A. Smiley to be filed and served via the Court's ECF system on all known counsel of record, and by regular first class mail upon:

/s/

Michael A. Oropallo